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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JAIME BILLY BISHOP,

Defendant and Appellant.

E035166

(Super.Ct.No. RIF 101137)

OPINION

APPEAL from the Superior Court of Riverside County. J. Thompson Hanks,
Judge. Affirmed with directions.

Leslie Conrad, under appointment by the Court of Appeal, for Defendant and
Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney
General, Gary W. Schons, Senior Assistant Attorney General, Pamela A. Ratner Sobeck,
Senior Assistant Attorney General, and Lynne G. McGinnis, Deputy Attorney General,
for Plaintiff and Respondent.

Defendant and appellant Jaime Billy Bishop appeals his conviction of murder with a lying-in-wait special circumstance. He appeals, contending that the court erred in admitting gang evidence, that the evidence was insufficient to support a lying-in-wait special circumstance finding, and that the court erred in including a parole restitution fine, inasmuch as defendant is sentenced to life imprisonment *without* the possibility of parole. We agree that the parole restitution fine should be stricken; in all other respects, the judgment is affirmed.

FACTS AND PROCEDURAL HISTORY

To make a long story short, defendant was convicted of aiding and abetting murder, after he helped Norbert “Bob” Nieto induce Bob’s wife, Tisha, to meet them at a secluded rendezvous. Bob and defendant lured Tisha into defendant’s car. They choked and strangled her. They then dumped her body at a remote location.

In 1991 or 1992, Bob and his two brothers, Mike and Joe, founded a “tagging crew,” called “Mad Crazy Krew,” or “MC.” Bob’s brother Mike was the leader of the group until he was imprisoned for murder. Bob assumed leadership of the group thereafter.

In 1996, Bob and Tisha were married. Tisha was 18 years old and had one child from a previous relationship. Bob was about 24 years old. During the course of the marriage, Tisha and Bob had three children. Throughout the relationship, Bob was verbally and physically abusive, jealous, domineering and controlling. He dictated when and if Tisha could visit her family or friends, he decreed what clothes she should wear, and he did not permit her to work outside the home or to have a car. Bob did not allow

Tisha to have her own money. Sometimes he worked; in other periods his source of income was selling drugs. Both Bob and Tisha were methamphetamine users. Bob's methamphetamine use probably contributed to his violent outbursts.

Once, at a New Year's Eve party, Bob became angered and punched Tisha in the face with his fist. Her nose was broken; her head snapped backward and broke several mirrored tiles on the wall. Witnesses described other occasions, when Tisha's arms were bruised, or the side of her face and her eye were purple and swollen. Bob frequently threatened to kill Tisha or to kill the children if she left him or otherwise failed to comply with his demands.

In an incident in 1998, Bob came home in the middle of the night, awakened Tisha, raped her, put a gun to her head and shredded all of her clothes. Apparently, he was angry because he thought a dress she had worn to church was indecent. For this incident, Bob was convicted of domestic violence and went to prison for 16 months.

While Bob was incarcerated, Tisha and the children lived with Tisha's parents. Although Bob was required as a condition of his parole not to have contact with Tisha, he and Tisha resumed seeing each other after he was paroled. Bob did not stop hitting Tisha, however.

Defendant and his twin brother, Jeremy, lived in the same neighborhood as other MC members. Defendant and Jeremy began associating with MC while Bob was imprisoned. Defendant, Jeremy and the other MC members would hang out and use drugs together. Bob resumed his "elder statesman" role as leader of MC when he was paroled. Defendant and Jeremy were among other young members recruited into MC;

Bob liked to order the youngsters around and use them as his “puppets.” After Bob was paroled, he was almost always accompanied by defendant or Jeremy. If Bob needed something, or he told defendant to “go do this or go do that[, defendant] would do it.”

In late 2001, the events leading to Tisha’s death began to unfold. On November 1, Bob told Tisha he wanted to take her to dinner for their anniversary. Tisha brought the children. Her own mother was ill and unable to look after the children; Tisha hoped that Bob’s mother would take care of the children while she and Bob went to dinner. As it turned out, Bob never took Tisha to dinner. Instead, he held Tisha and the children as virtual hostages for several weeks, until shortly before Thanksgiving. Tisha called her mother for help, saying that Bob had threatened to kill her. Tisha’s mother called police, who intervened to remove Tisha and the children from the home of Bob’s parents. Tisha went to stay with her aunt in Lancaster, but soon returned to Bob because of his threats to kill her. Bob informed Tisha that he had joined the Mexican Mafia while in prison, and warned that he could have her killed, or the children, or anyone else who might assist her if she tried to leave him.

A few days after Tisha’s return, Bob pulled Tisha out of bed and dragged her out of the house by her hair. He wanted to smoke methamphetamine with her. When she refused, he forced the glass pipe into her mouth and clouted her under the chin, causing the pipe to break. He also slammed a car door on her leg.

The next day, December 10, Tisha filed a police report. She took the three younger children to her parents’ house, borrowed her father’s truck, and went to pick up the oldest child from his school. When she found that the child was not at school, she

drove to Bob's parents' house. The child was there; she called to him, and he ran out and climbed into the truck. As Tisha drove away, Bob jumped into his own car and chased her. He struck her vehicle and forced her off the road. The police responded to the scene and took a police report. Bob had left the area. He went into hiding to avoid the police investigation.

Tisha went to her parents' home with the children. Tisha intended finally to cut her ties with Bob. On December 12, she initiated dissolution proceedings and filed for a temporary restraining order against him.

During the next couple of weeks, Bob migrated from hotel room to hotel room, always accompanied by his brother Joe, Cynthia Vigil, and defendant. The foursome sold drugs from their hotel rooms, used a large quantity of methamphetamine, and stayed awake for days at a time. Tisha gave her pager number to Joe, and asked Joe not to give it to Bob. She told Joe that she did not want to talk directly to Bob, that Bob would have to go through Joe. Bob fumed to Joe that he needed to "get rid of" Tisha.

Tisha went to visit Bob's brother Mike in prison. Mike was also a member of the Mexican Mafia. Tisha was concerned about the threats defendant had made. Apparently, the visit satisfied her that Mike would make arrangements with the Mexican Mafia to assure her safety.

On December 24, Bob, defendant, Joe, and Joe's girlfriend were staying in a hotel room in Riverside. They had been smoking methamphetamine and had been awake for a few days. Bob was getting fidgety and paranoid. He asked Joe to call Tisha; he directed Joe to tell Tisha that he wanted to see his children on Christmas Eve. At first, Tisha

refused, but then she agreed to let Bob meet her at a photocopy store where she was working on a last-minute Christmas project.

At that time, defendant was the only one of the group who had a car. He and Bob left the hotel room to meet Tisha at the copy shop. Defendant drove Bob to the copy shop. Bob sent defendant into the store. Defendant asked Tisha to come outside; she declined. She preferred to stay inside the business, where other people were present. Defendant asked Tisha where she would be later in the evening, but she would not tell him. Defendant returned to the car and reported his lack of success to Bob. Defendant drove away a short distance. He stopped the car, and he traded places with Bob. Bob drove back to the copy shop and sat in the parking lot, watching and waiting for Tisha to leave. Bob saw Tisha drive away; he and defendant then returned to their hotel.

Once they had regained their room, Bob asked Joe to call Tisha again. Bob seemed a little paranoid. He said he had not been able to talk to Tisha because she had had a “bunch of guys” with her for protection at the copy shop. Joe did as he was bid, and paged Tisha. Bob got on the phone and pleaded with her to meet with him. Joe, fearing trouble, suggested that they meet at the hotel room. Bob vetoed this plan; he wanted to meet Tisha at a park near some orange groves. Tisha, Bob and other MC members had often gone there in the past to do drugs. The location was secluded, surrounded by trees, and poorly lit. After Bob promised to give Tisha drugs and some money for the children for Christmas, Tisha agreed to meet him at the park.

Defendant drove Bob to the rendezvous point. Tisha arrived, driving a second-hand car her parents had bought for her. As promised, Bob gave Tisha some

methamphetamine. She got into defendant's car with defendant and Bob. Defendant was driving. Tisha took the front passenger seat. Bob positioned himself in the rear seat behind Tisha.

Defendant drove away. From his vantage point behind her, Bob grabbed Tisha's necklaces and choked her with them. Defendant drove to Lake Mathews, an even more isolated location. Defendant drove his car into the orange groves at Lake Mathews and stopped his car. He helped Bob take the unconscious Tisha out of the car. Tisha appeared to be dead. Bob and defendant dragged Tisha up a dirt road, and left her body in some bushes. At Bob's behest, defendant took a white shoelace from one of his shoes. Bob knotted the shoelace tightly around Tisha's neck and told defendant, "Now you can't rat on me."

Defendant and Bob left Tisha lying on the ground. They drove to the house of defendant's friend, Johnny Alcantar. Alcantar gave defendant a black shoelace, which defendant used to replace the missing lace. Defendant and Bob spent Christmas Day at Alcantar's house; neither mentioned anything about the events of the previous evening. They behaved as if nothing had happened, and spent the time playing video games, drinking, doing drugs, and celebrating the holidays. They left on the afternoon of December 26.

Defendant agreed to drive Bob to Long Beach that afternoon. Bob's car was not running, but he thought he could arrange to pawn it to a party in Long Beach.

In the meantime, Tisha's family became alarmed when Tisha did not return on Christmas Eve. Tisha's car was found, abandoned, at the park. Tisha's wallet, purse and

day planner were still in the car. A bandana belonging to Bob was also found in Tisha's car. While police continued to search, Tisha's body was found at Lake Mathews. She was lying face down with the shoelace tied around her neck. The examiners found a small bindle of methamphetamine and a glass pipe tucked inside her bra. A \$10 bill lay on the ground nearby.

The pathologist opined that Tisha was still alive at the time the shoelace was tied around her neck. The cause of death was ligature strangulation, although there may have been a component of manual strangulation as well. When Tisha's body was found, her hand was near her neck and her fingernail was broken, supporting the inference that the shoelace ligature was the cause of death. Defendant told Jeremy and Joe that Bob asked for the shoelace, and that Bob was the one who tied the shoelace around Tisha's neck. Defendant also told Jeremy that he gave his shoelace to Bob out of fear. It was defendant's footprints, however, which surrounded Tisha's body, while Bob's shoeprints were some distance away.

Warrants issued for Bob and defendant. They were apprehended at a pawn shop in Long Beach and taken to Riverside for questioning. At first, defendant denied having seen Tisha for several days. Then defendant told police that Bob had borrowed defendant's car on Christmas Eve; defendant did not know where Bob had gone, but Bob later told him he had seen Tisha at the copy shop. Defendant also related that Bob had told him that "a couple of guys in a car" had tried to carjack him. Still later, defendant changed his story and said he and Bob had gone to the copy shop together to see Tisha. Bob would not go inside the store because he would not violate the restraining order. He

sent defendant to talk to Tisha, but she would not speak with him. Defendant and Bob sat in defendant's car, watched Tisha enter her car and drive away, and never saw her again. Defendant could not explain why he had two different colored shoelaces in his shoes.

Both Bob and defendant were charged in Tisha's murder. Before trial, Bob committed suicide.

A jury found defendant guilty of first degree murder, and found true a lying-in-wait special circumstance. The court sentenced defendant to life imprisonment without the possibility of parole.

Defendant now appeals.

ANALYSIS

I. The Gang Evidence Was Properly Admitted and Nonprejudicial

Numerous witnesses at trial testified about the Mad Crazy Krew or MC. Several witnesses gave evidence to the effect that, while MC began as a "tagging crew," or graffiti crew, it eventually developed into a gang. The three Nieto brothers, Bob, Mike and Joe, as well as defendant and his twin brother Jeremy, were commonly called by nicknames or "monikers." Over time, the group expanded its activities to include not only graffiti vandalism, but more serious crimes. Some MC members beat up children in the park where the crew liked to hang out. Defendant and Jeremy got large "MC" tattoos. A number of the members used drugs and sold drugs. Some members, including Mike, the original leader, were involved in murder.

Defendant urges that such testimony, offered by lay persons who were members of the neighborhood group or closely associated with them, was akin to expert testimony

about gangs. The lay witnesses, such as Tisha's best friend, Erica Avila, should not have been permitted to testify that MC was a "gang," in the absence of any criminal street gang allegations or any foundation of expertise in gangs.

Defendant argues that the gang references were prejudicial, because the jury may have convicted him simply for his association with a group that committed other bad acts. We reject the contention.

First, the evidence was relevant. It was not admitted merely to show defendant's criminal propensities or bad character; it was admissible because it was logically relevant to other material issues in the case, such as motive or intent.

The existence of MC, Bob's leadership role in it, his surrounding himself with younger cronies whom he could "lord it over," and who looked up to him as a role model, were all facts which helped explain defendant's relationship to Bob, and why defendant might be inclined to do whatever Bob said.

Evidence of a relationship between a party and another person may be logically relevant to disputed issues -- to show bias, for example. (*People v. Ruiz* (1998) 62 Cal.App.4th 234, 240.) "One such relationship is common membership in an organization: business, fraternal, national, etc." (*Ibid.*) Here, the organization was MC, variously described as a tagging crew, a gang, or a close-knit social group from the "hood."

Defendant urges that, even if evidence of membership in a gang may be admitted on issues such as bias, the evidence is admissible only if "it is not cumulative to other properly admitted, and less inflammatory, evidence." (*People v. Ruiz, supra*, 62

Cal.App.4th at p. 240, citing *People v. Cardenas* (1982) 31 Cal.3d 897, 904-905, and other cases.) Defendant urges that the gang evidence here was cumulative and inflammatory, and that other evidence established his relationship with Bob. We disagree. Only defendant's membership in MC explained why defendant, who joined as a teenager, would have such close and constant contact with Bob, who was several years older than himself. Only common membership in MC explained their activities together, which appeared to consist largely of being a "gofer" for Bob, using drugs together, and assisting in Bob's drug sale activities. The evidence was relevant, and was not merely cumulative to other evidence.

Second, the evidence was properly admitted under Evidence Code section 352. Defendant argues that, even if his gang membership was relevant, the trial court should have excluded it anyway, as more prejudicial than probative. The evidence of defendant's membership in MC was not, however, used to show simply criminal disposition. No argument was made that the killing was itself gang-related.

Rather, the evidence concerning MC, like no other evidence, explained why defendant would be willing to act on Bob's behalf, when defendant otherwise had no obvious connection to Tisha. As an MC "youngster" who "looked up" to Bob as a "role model," defendant's behavior is explained: why he was Bob's constant companion while Bob was "on the run," why he would act as Bob's chauffeur and ambassador, why he would attempt to persuade Tisha to come outside, to meet Bob away from a public location, why he would arrange the rendezvous, even though he knew that Bob had often severely beaten Tisha and threatened to kill her, and why he would help Bob commit the

murder. Defendant's position in the social group, as hero-worshipping acolyte to Bob's guru role, was properly admissible to show defendant's willing participation in the crime, to show that he acted with the requisite premeditation and deliberation, and to undermine defendant's claims that he acted solely out of fear.

The court carefully scrutinized the potential inflammatory effect of the evidence before admitting it, as required under Evidence Code section 352. There were cogent reasons to admit the evidence. We cannot say that the trial court abused its discretion in determining that the probative value of the evidence outweighed its prejudicial value.

(People v. Williams (1997) 16 Cal.4th 153, 193.)

Third, defendant was not prejudiced. The evidence showed that defendant, acting on Bob's behalf, tried to lure Tisha outside the copy shop, although Tisha had been reluctant to meet Bob other than in a public place. Defendant well knew that Bob had beaten Tisha and threatened her in the past. Nevertheless, he willingly drove Bob to the park, a dark and isolated location, where Bob had persuaded Tisha to meet him by promising drugs and money. Tisha got into defendant's car, whether by persuasion or otherwise. (There was some evidence – e.g., Bob's bandana, food wrappers – suggesting that Bob, defendant, or both, may have been in Tisha's car; perhaps she was taken by force at that point, as she left her purse, her wallet and her dayplanner behind.)

Once Tisha was in the car, defendant drove away. He went to a second isolated location while Bob strangled Tisha with her necklaces. He helped Bob take the unconscious body from his car, his footprints were all around the body, and his shoelace – the ligature ultimately completing the strangulation – was wrapped tightly around the

victim's neck, and knotted in the back. Defendant callously backed away, drove off, and spent the next two days with his friends, celebrating the holidays and pretending that nothing had happened. He never called police, and he never called for medical help. The evidence was essentially uncontradicted on all these points.

In the absence of the gang evidence (“gang” in its colloquial sense, and not necessarily in terms of the statutory definition of a “criminal street gang”), the jury would still have been presented with all of the evidence of defendant’s actions, as set forth above, assisting in the murder; in the face of such evidence, there is no realistic possibility that the jury convicted defendant because of his membership in the MC group. Beyond a reasonable doubt, the gang evidence did not contribute to the verdict in this case. (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 828, 17 L.Ed.2d 705].)

II. Substantial Evidence Supports the Lying-in-wait Special Circumstance

Defendant next argues that the evidence was insufficient to support a true finding on the special circumstance allegation that the murder was committed by means of lying in wait. (Pen. Code, § 190.2, subd. (a)(15).) The lying-in-wait special circumstance “requires proof of ‘an intentional murder, committed under circumstances which include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage.’ [Citations.]” (*People v. Michaels* (2002) 28 Cal.4th 486, 516.)

Here, the evidence showed that defendant often acted as Bob's willing lackey, and he was inseparable from Bob while Bob was "on the run" from the police, after he ran Tisha's car off the road. They moved from hotel room to hotel room, dealing drugs and using drugs. Defendant knew that Bob had often been violent toward Tisha, and in fact had gone to prison after a particularly nasty episode. Tisha had taken out a restraining order against Bob; she had never done that before. Tisha refused to give Bob her telephone number; she asked Joe to act as intermediary, and did not want direct contact with Bob. On Christmas Eve, Bob had Joe page Tisha; Bob pleaded with her to let him see the children. At first, Tisha did not want to meet at all. Then she agreed to see Bob at a public place of business (the copy shop) where other people were around.

Defendant drove Bob to the copy shop. Bob did not want to go inside. He became a little "paranoid," saying that some "guys" were watching out for Tisha. Bob sent defendant inside instead. Significantly, the purpose for which Bob sent defendant inside was to attempt to persuade Tisha to come outside the store, i.e., to a less public location. Tisha refused to leave the relative safety of the store. Defendant then quizzed Tisha about where she was going afterward, but she would not say.

Bob then directed defendant to drive away a short distance, where they then changed places. Bob drove back to the parking area by the copy shop. He and defendant sat in the car, watching and waiting until they saw Tisha drive away.

They returned to their hotel room, where Bob immediately had Joe call Tisha again. Bob insisted on taking the telephone, and he pleaded with Tisha. Bob played on Tisha's feelings by saying he wanted to see the children at Christmas, and he promised

her drugs and money if she would meet him. Joe suggested that they meet at the hotel room, because he vaguely feared some trouble. Bob and defendant ignored this advice, however.

Defendant knew that Bob was providing no support for the children, and he was present when Joe told Bob that, for that reason, Tisha did not want to let him see the children for Christmas. The rendezvous point was an isolated area late at night. MC members had often used drugs in the relative seclusion of the park. Bob, as the leader of MC, had evidently staked out the park as MC turf and discouraged the general public from using the park; he had frequently ordered the younger members of MC, including defendant, to beat up children passing through the park. Bob induced Tisha to meet him with promises of drugs and money. These circumstances gave defendant very good reason to know both that Tisha would not be likely to bring the children to a late-night meth-smoking session, and that Bob would therefore be able to confront her alone and without fear of detection.

Defendant willingly drove Bob to the park. Sure enough, Tisha soon arrived, alone. Tisha was either forced or enticed to get into defendant's car. Tisha sat next to defendant in the front seat, even though witnesses testified that Bob was too jealous to let Tisha sit next to another man. Bob sat behind her in the back seat, although witnesses stated that Bob would "never, never" sit in the back seat of a car, as he considered it beneath his status.

If the meeting was innocent, there would have been utterly no reason to drive from one isolated area to another. Yet the drive provided Bob the perfect opportunity to catch

Tisha unaware by choking her with her necklaces. Defendant never stopped the car and never stopped Bob from choking Tisha into unconsciousness. At Lake Mathews, he helped Bob drag Tisha from the car and hide her body under some bushes. He supplied the shoelace with which her demise was ultimately accomplished.

The evidence was certainly sufficient to establish that defendant was well aware of and participated actively in a plan intentionally to murder Tisha. He and defendant concealed their purpose from Tisha. Defendant tried to entice Tisha to come out of the copy shop, but she refused. Bob used the ruse of talking about the children, plus the inducements of drugs and money, to lure Tisha to a lonely meeting place.

A period of watching and waiting took place, in which Bob “kept tabs” on Tisha. He tried to get her to meet him. Finally, she agreed that he could see her at the copy shop. Bob would not go inside, because Tisha was protected. Defendant tried to lure Tisha outside, but she would not go. Defendant also tried to find out where Tisha was going after she was done with her copying, but she would not tell him. Defendant and Bob pretended to drive away, but sneaked back and watched to see when Tisha left. Bob and defendant returned at once to their hotel room and, knowing that Tisha had left the copy shop, immediately reestablished contact with her. Bob induced Tisha to meet them at the park.

Once Tisha arrived at the park, defendant and Bob created the “opportune time” for the attack. Tisha was lured into the car, and Bob carried out a surprise attack on the unsuspecting Tisha from the advantageous position of choking her from behind. The

evidence supports the view that defendant knew of, participated in and facilitated all of the required elements.

The lying-in-wait special circumstance finding was proper.

III. The Parole Restitution Fine Should Be Stricken

Lastly, defendant contends that the court erred in imposing a parole restitution fine under Penal Code section 1202.45. Defendant is correct. Inasmuch as defendant was sentenced to life in prison without the possibility of parole, Penal Code section 1202.45 has no application. (*People v. Oganessian* (1999) 70 Cal.App.4th 1178, 1183.) The People concede the point.

Remand is not required, however. This court can modify the judgment and direct the trial court to amend the abstract of judgment.

DISPOSITION

The judgment is modified to strike the inapplicable Penal Code section 1202.45 restitution fine. In all other respects, the judgment is affirmed. The clerk of the superior court is directed to prepare an amended abstract of judgment consistent with this opinion.

The superior court clerk is then directed to transmit the corrected abstract of judgment to the Department of Corrections.

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s/Ward
J.

We concur:

s/Hollenhorst
Acting P. J.

s/King
J.